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10 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

11
12 PERRY ASHELMAN,

13 Petitioner,

14 v.

15 PATRICK R GLEBE,

16 Respondent.
17

CASE NO. C09-5748RBL/JRC

REPORT AND
RECOMMENDATION

Noted for July 30, 2010

18 The underlying Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 has
19 been referred to United States Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. §
20 636(b) (1) (A) and (B), and Local Magistrate Judge's Rule MJR3 and MJR4. Petitioner is
21 proceeding as a pauper.
22

23 This petition is unexhausted and procedurally barred because petitioner did not file a
24 motion for discretionary review in the Washington State Supreme Court after the Washington
25 Court of Appeals denied his personal restraint petition.
26

1 Petitioner is challenging the loss of 15 days goodtime credits for a serious infraction he
2 received because he sexually harassed a female correctional officer (Dkt. # 5). He alleges that he
3 did not receive due process at his disciplinary hearing because the hearings officer would not
4 give him a continuance to interview the Intelligence and Investigations unit personnel, or view a
5 video tape of the incident (Dkt. # 5). There is no evidence that a video tape of the incident exists
6 according to the Washington Court of Appeals (Dkt. # 15, Exhibit 3, page 4).

8 FACTS

9 The Washington Court of Appeals summarized the facts that are germane to this petition
10 as follows:

11 Mr. Ashelman was charged with the 659 infraction on March 13, 2008, after
12 he waved at a surveillance camera focused on his cell to get the attention of
13 corrections officer Vickie McMahon and then repeatedly exposed and fondled
14 himself. The officer reported Mr. Ashelman's actions as inappropriate and offensive
15 behavior that made her feel uncomfortable. (DOC Response, Exhibit 2, Attachments
16 A, E) In a supplemental report, Officer McMahon stated that Mr. Ashelman did not
17 engage in such behavior when male staff came into the camera booth. (Exhibit 2,
18 Attachment E)

19 On March 17, 2008, Mr. Ashelman was given a copy of the infraction report
20 and a hearing notice explaining his due process rights and informing him that he
21 could request witness statements in his defense. He requested none. (DOC Response,
22 Exhibit 2, Attachment B) His disciplinary hearing was held on March 19. During the
23 hearing, he requested a continuance for an interview with the Intelligence and
24 Investigation (I&I) Unit and to review the videotape. (Exhibit 2, Attachment B;
25 Exhibit 3, at 3) The hearing officer denied his request and found him guilty based
26 upon the Officer McMahon's infraction report and supplemental observation report.
The hearing officer imposed sanctions of 15 days lost good time credit and 3 days in
isolation. The hearing officer gave as a reason for the sanctions that Mr. Ashelman
committed blatant sexual harassment of a staff member. (Exhibit 2, Attachments B,
D)

Mr. Ashelman was given a written statement of the evidence relied upon and
the reason for the sanctions. (DOC Response, Exhibit 2, Attachment D) The prison
superintendent's designee denied his administrative appeal. (Exhibit 2, Attachments
F, G)

(Dkt. # 15, Exhibit 3, pages 1 and 2).

1 B. *Procedural Bar.*

2 Respondent argues that petitioner cannot return to state court because he has already filed
3 a collateral challenge and any subsequent petition will be barred pursuant to RCW 10.73.140.
4 When a state prisoner defaults on his federal claims in state court pursuant to an independent and
5 adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner
6 can demonstrate cause for the default and actual prejudice, or show that failure to consider the
7 claims will result in a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722,
8 750-51 (1991). Federal habeas review is also barred when the petitioner has not exhausted state
9 remedies but the state's highest court would now find the claim to be procedurally barred.
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11 Coleman, at 733; Noltie v. Peterson, 9 F.3d 802, 805 (9th Cir. 1993).

12 The state court would now find petitioner's claims second or successive claims, and,
13 therefore, barred pursuant to RCW 10.73.140. Petitioner cannot show cause and prejudice because
14 nothing the state did prevented him from filing a motion for discretionary review. He has made no
15 showing that a fundamental miscarriage of justice has occurred in this case. The court recommends
16 this petition be dismissed as procedurally barred.
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18 CERTIFICATE OF APPEALABILITY


19 A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district
20 court's dismissal of his federal habeas petition only after obtaining a certificate of appealability
21 (COA) from a district or circuit judge. A certificate of appealability may issue only where a
22 petitioner has made "a substantial showing of the denial of a constitutional right." See 28 U.S.C.
23 § 2253(c) (3). A petitioner satisfies this standard "by demonstrating that jurists of reason could
24 disagree with the district court's resolution of his constitutional claims or that jurists could
25 conclude the issues presented are adequate to deserve encouragement to proceed further."
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1 Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). Under this standard, this Court concludes that
2 petitioner is not entitled to a certificate of appealability with respect to this petition.

3 **CONCLUSION**

4 This petition is procedurally barred. This petition should be DISMISSED. Pursuant to
5 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from
6 service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file
7 objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474
8 U.S. 140 (1985). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is
9 directed to set the matter for consideration on July 30, 2010, as noted in the caption.
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11 Dated this 8th day of July, 2010.

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14 J. Richard Creatura
15 United States Magistrate Judge
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